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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS EFRON MOLINA, Defendant and Appellant.	G029043 (Super. Ct. No. 97CF3367) O P I N I O N
THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO ANGUIANO, Defendant and Appellant.	G029396

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseno, Judge. Affirmed.

William J. Kopeny & Associates and William J. Kopeny for Defendant and Appellant Molina.

Joseph F. Walsh for Defendant and Appellant Anguiano.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Robert M. Foster and Barry J.T. Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Guillermo Anguiano and Carlos Molina were convicted of conspiracy to commit murder, attempted murder, possession of a firearm within 1,000 feet of a school zone, and carrying a firearm while an active participant in a criminal street gang. In this consolidated appeal, defendants raise six contentions: (1) the trial court erred in admitting hearsay; (2) a gang expert's testimony was inadmissible; (3) insufficient evidence supports the conspiracy and attempted murder convictions; (4) the gang firearm count and a gang enhancement cannot stand because the requisite predicate offenses were not proven; (5) the court erred in failing to instruct sua sponte on conspiracy to assault with a deadly weapon as a lesser included offense of conspiracy to commit murder; and (6) based on its verdict form, the jury found them guilty only of "conspiracy to commit a crime," not conspiracy to commit murder. None of these arguments require reversal, and we therefore affirm.

I

FACTS

On the evening of November 3, 1997, Francisco Zuniga and Juan Madrigal were on the swings at the Edison Elementary School playground in Santa Ana. Both associated with members of a street gang known as TFK (Too Fucking Krazy). Shortly before 7:00 p.m., two men in a dark Mustang drove by the playground. One of the men displayed the letter "P," the handsign of TFK's rival gang, Prestige Crew (Prestige). Zuniga responded by raising his middle finger. The Mustang drove away.

A short time later, someone started shooting at Zuniga and Madrigal. Zuniga estimated between five and ten shots were fired. At trial, he testified he did not know where the shots came from or who was shooting. But according to Officer Richard Ashby of the Santa Ana Police Department, during a police interview, Zuniga identified one of the shooters on a school bungalow roof as "Doughboy." Zuniga never saw the shooter's face. The shots were fired in the dark from 70 feet away and no shell casings were found to identify the gun. The gunmen missed their mark — both Zuniga and Madrigal escaped unharmed. The jury subsequently acquitted both defendants of this shooting.

Zuniga and Madrigal decamped to a TFK hangout, the home of Florencio Arevalo. Zuniga and Madrigal described the shooting incident to Arevalo and Madrigal's brother, Eliberto Madrigal (Eliberto), while they ate the pizza in the backyard.

Around 8:00 p.m. on the same evening, Monique Alvarado joined her boyfriend, Prestige member Erick Gomez, at a fellow gang member's house. Gomez appeared anxious as several people conversed while handling a semiautomatic handgun. He told Alvarado he was going to visit a friend and left with two men known as "Scopes" and "Doughboy," later identified as the defendants, Carlos Molina and Guillermo Anguiano.

Shortly before 9:00 p.m., Eliberto was walking down Arevalo's driveway when someone emerged from behind a tree and started shooting at him from seven feet away. The assailant continued firing after Eliberto turned and fled. Out of the nine rounds fired, Eliberto was hit four times, suffering wounds above his hip and in his buttock, lower leg, and foot. He spent six weeks in the hospital. None of the witnesses could identify the shooter. Testing of the cartridge casings found at the scene established

the shots were fired from the nine-millimeter semiautomatic handgun later found in Gomez's car.

Officer Richard Ashby, a gang expert, testified the two shootings were based on a rivalry between the Prestige and TFK gangs. Prestige suspected TFK murdered one of its members in August 1997, and according to gang code, his death required Prestige to respond in kind.

After the school shooting, Santa Ana police officers responded to the scene and remained to patrol the area. At about 9:00 p.m., Officer Doyle Smith heard gunfire and spotted a Nissan automobile speeding away. Smith and two other police vehicles pursued the vehicle and stopped it. Gomez quickly exited from the front passenger side, tossed a loaded .40-caliber Glock into the street, and ran. Molina and Anguiano remained sitting in the driver's seat and the middle of the backseat, respectively. Officers found an empty nine-millimeter semiautomatic handgun on the rear floor, a loaded .38-caliber revolver on the grass nearby, and ammunition and a notebook with gang graffiti in the trunk. Molina and Anguiano were arrested. The barrel of the semiautomatic retained Gomez's left thumbprint. Tests also revealed gunshot residue particles on the left hands of Molina, Anguiano, and Gomez.

Gomez had his girlfriend, Alvarado, pick him up at a convenience store. When Alvarado arrived, Gomez was dirty and sweaty and his clothes were torn. The police arrived and arrested them both. Gomez later escaped custody and was not tried with Molina and Anguiano.

The jury convicted Molina and Anguiano of conspiracy, attempted murder, possession of a firearm within 1,000 feet of a school zone, and carrying a firearm while an active participant in a criminal street gang. The jury found defendants' attempt to

murder Eliberto was premeditated and deliberate. The jury also found defendants' crimes were carried out for the benefit of a criminal street gang. Defendants now appeal.

II

DISCUSSION

A. HEARSAY

Defendants argue for the first time on appeal that testimony by Officer Richard Ashby contained two inadmissible hearsay statements. Both defendants cite as hearsay Ashby's testimony that while Alvarado at first denied to him she ever told anyone the defendants and her boyfriend (Gomez) discussed a "payback" shooting, she conceded that if another officer's "report said that that's what she told him, then that's what she would have to . . . go with." In other words, Ashby testified Alvarado agreed the police report accurately recorded her earlier statements. Molina also complains Ashby's testimony included hearsay statements by Arevalo that he saw the muzzle flashes when Eliberto was shot and that he and Eliberto were TFK associates, whereas at trial Arevalo did not remember telling Ashby he saw the shots fired and denied he was a gang member.

Neither defendant, however, objected to Ashby's testimony on hearsay grounds. "'It is, of course, "the general rule"' — which we find applicable here — '"that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."'" (*People v. Waidla* (2000) 22 Cal.4th 690, 717 (*Waidla*) [applying waiver doctrine to hearsay claim].) In *Waidla*, the defendant "rest[ed] his point on an assertion of inadmissible hearsay." (*Ibid.*) But the Supreme Court noted defendant failed to object at trial. "[B]ecause of his omission," the court observed, "we are without evidence to judge confidently what parts of the testimony in question that might have

amounted to otherwise inadmissible hearsay might have come within one or more exceptions, including the apparently available ones covering admissions and adoptive admissions." (*Ibid.*)

Similarly, if either defendant had raised a hearsay objection, the prosecution would have had the opportunity to seek admission of Alvarado's and Arevalo's statements on grounds they were inconsistent with their trial testimony. But the defendants' failure to object deprived the prosecution of this chance (a strong one it appears) and leaves us "without evidence to judge confidently what parts of the testimony in question . . . might have come within one or more exceptions . . . ." (*Waidla*, *supra*, 22 Cal.4th at p. 717.) As the Supreme Court concluded in *Waidla*, each defendant "alone must bear the consequences of the evidentiary void for which he alone is responsible." (*Ibid.*)

B. GANG EXPERT'S TESTIMONY

Defendants complain of a trial court ruling allowing the prosecution's gang expert to testify the probable motive for the shootings was revenge for TFK's earlier murder of a Prestige associate. The expert based his opinion, in part, on certain postarrest statements made by the defendants, but this information was not disclosed to the jury because of Sixth Amendment confrontation issues applicable to nontestifying codefendants in a joint trial. (See *People v. Fletcher* (1996) 13 Cal.4th 451, 465.) Absent his reliance on the defendants' postarrest statements, we are told, the expert lacked any foundation to support his opinion the shootings were payback for an earlier confrontation. Defendants emphasize that, despite questioning from the prosecutor on this issue, "Monique Alvarado had failed to provide the necessary factual testimony concerning the existence of such a motive."

This argument lacks merit. Alvarado did not testify as to the motive for the crime, but conceded to Ashby she had told another officer the shooting was "payback." As discussed above, defendants failed to object to this testimony. (*Waidla*, *supra*, 22 Cal.4th at p. 717.) As long as it is reliable, even ordinarily inadmissible matter can serve as a proper basis for an expert's opinion, including hearsay. (*In re Fields* (1990) 51 Cal.3d 1063, 1070.) Experts may properly rely on conversations with gang members in forming their opinions. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 968 (*Gamez*), disapproved on another ground in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10 (*Gardeley*).) Defendants did not suggest Alvarado's statement was unreliable.

Furthermore, it appears the police had information corroborating Alvarado's statement to Ashby. (See *Gamez*, *supra*, 235 Cal.App.3d at p. 966 [gang expert opinions may be based on "personal observations of and discussions with gang members as well as information from other officers and the department's files"].) Ashby testified a Prestige associate named "Angel" was murdered in 1997 and the police suspected TFK killed him. There is no reason to suppose this information came solely from defendants' postarrest statements or Alvarado's hearsay statement. Combining this information with the Prestige shootings in this case, we find there was adequate foundation for Ashby's opinion the shooting was "payback" for Angel's murder. As Ashby explained, the gang code called for revenge in kind. Defendants do not suggest Ashby was unqualified to render this opinion. In short, there was no error.

C. SUBSTANTIAL EVIDENCE

Defendants challenge the sufficiency of the evidence to support the conspiracy and attempted murder convictions. They also contend there was no evidence the attempted murder was premeditated and deliberate. Reviewing the claim under the

appropriate deferential standard (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), we must disagree.

Citing *Lavine v. Superior Court* (1965) 238 Cal.App.2d 540, 543, defendants note "there must be some evidence from which the unlawful agreement can be inferred before criminal liability may be imposed on the basis of conspiracy." Owing to the secret nature of conspiracies, proof is typically circumstantial. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606-1607, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 867.) Here, Alvarado's statement to an investigating officer placed both defendants at a Prestige house talking and handling a semiautomatic handgun shortly before the crime. Defendants were found in the same car together with several guns, including a semiautomatic, as well as gunshot residue on their hands from the weapon used to gun down the victim. Reliance on *People v. Aday* (1964) 226 Cal.App.2d 520 does not aid defendants. True, the court there stated, "Mere association does not establish a conspiracy, but there must be evidence of some participation or interest in the commission of the offense." (*Id.* at p. 533.) Here, the jury could conclude defendants participated in the offense given their presence during the discussions at the Prestige house, their presence in the vehicle speeding away from the scene, and the gunshot residue on their hands. Substantial evidence supports the conspiracy conviction.

Similarly, substantial evidence supports the attempted murder conviction. Defendants suggest there was no evidence of the requisite intent to kill, given the location of the wounds in Eliberto's lower body. They also argue there was no evidence they were at the shooting or, at most, they were merely in the vehicle with Gomez. These arguments are without merit. The evidence showed the semiautomatic was emptied at Eliberto from close range and the shots continued after he fell to the ground, suggesting

an intent to kill and not simply wound. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224-1225.) The earlier conspiratorial meeting at the Prestige house and the discovery of gunshot residue on defendants' hands demonstrates they were active participants in a premeditated plan to kill. (See *People v. Thomas* (1992) 2 Cal.4th 489, 517-518 [evidence of planning supports premeditation finding].) Substantial evidence supports the conviction for attempted murder.

D. GANG ENHANCEMENT AND CONVICTION

Defendants contend a gang enhancement and the conviction for carrying a firearm as a gang member should both be reversed because the jury acquitted them of the earlier school shooting. Absent conviction for this offense, defendants argue no "pattern of criminal gang activity" existed to support the sentencing enhancement and the firearm conviction. We disagree.

A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. (Pen. Code, § 186.22, subd. (e) (all further statutory references are to this code); *Gardeley, supra,* 14 Cal.4th at p. 617.) The predicate offenses must be committed on separate occasions, or by two or more persons. (§ 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9-10 (*Loeun*).) The charged crime may serve as a predicate offense. (*Gardeley*, *supra*, 14 Cal.4th at p. 625.)

Defendants assume *they* had to commit both predicate offenses and that each offense had to result in conviction. Neither assumption is correct under *Loeun*. There, defendant assaulted the victim with a baseball bat, first on the head and then on

the shoulder. Seconds later, another member of the gang struck the victim in the ribs with a tire iron. (*Loeun*, *supra*, 17 Cal.4th at p. 6.) Defendant was convicted of one count of assault with a deadly weapon. Although the second gang member was not charged with any crime, the Supreme Court held the two assaults constituted a "pattern of criminal gang activity" within the meaning of section 186.22, subdivision (e). (*Loeun*, *supra*, 17 Cal.4th at p. 14.)

Here, defendants do not dispute substantial evidence showed Prestige members committed the school shooting, even though the jury was not satisfied beyond a reasonable doubt defendants themselves committed the crime. Just before the shooting, TFK members spotted someone in a passing car flashing a Prestige handsign at them. One TFK member responded with an obscene gesture and a short time later the two men came under fire. This criminal conduct and the shooting for which defendants were convicted together constitute the requisite two or more predicate offenses. Moreover, defendants' convictions for conspiracy to commit murder and attempted murder independently satisfy the predicate offense requirement of section 186.22, subdivision (e). Hence, the jury's finding is supported on this rationale as well.

E. LESSER INCLUDED OFFENSE

Defendants next argue the trial court had a sua sponte duty to give instructions on lesser included offenses, specifically, conspiracy to commit assault with a deadly weapon as a lesser included offense of conspiracy to commit murder and assault with a deadly weapon as a lesser included offense of attempted murder. We conclude any error in the failure to give lesser included instructions was harmless.

The rule is this: "[E]ven in the absence of a request, the trial court has a sua sponte duty to instruct on lesser included offenses when there is substantial evidence

the defendant is guilty only of the lesser offense. [Citation.] This requirement is based upon the rule that 'the court must instruct sua sponte on "the 'general principles of law governing the case;'" i.e., those "'closely and openly connected with the facts of the case before the court.'" [Citations.]' [Citations.] More recent cases have found the requirement is based upon the defendant's '"constitutional right to have the jury determine every material issue presented by the evidence."' [Citations.]" (*People v. Cook* (2001) 91 Cal.App.4th 910, 917 (*Cook*).)

Two different tests apply in this context. "The 'elements' test is satisfied if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed without committing the lesser offense. [Citation.] The 'accusatory pleading' test is satisfied if 'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].' [Citation.]" (*Cook*, *supra*, 91 Cal.App.4th at p. 918.)

Neither party contends conspiracy to commit assault with a deadly weapon is included within conspiracy to commit murder under the statutory elements test. Instead, defendants rely on the accusatory pleading test, citing *Cook*. There, the conspiracy allegation with its overt acts was pleaded similarly to the allegations in this case. (See *Cook*, *supra*, 91 Cal.App.4th at p. 919, fn. 22.) Here, the overt acts alleged in the information were: (1) defendants and Gomez met and armed themselves with several handguns; (2) they drove to the residence of a rival TFK gang member; (3) Gomez exited the vehicle and shot at Eliberto at least nine times, hitting him in the buttocks, calf, and foot; and (4) defendants and Gomez fled in their car. Based on the allegations of specific overt acts in the information, *Cook* held conspiracy to commit assault with a deadly

weapon was a necessarily included offense of conspiracy to commit murder. (*Id.* at p. 920.)

In reaching this conclusion, *Cook* parted company with *People v. Fenenbock* (1996) 46 Cal.App.4th 1688. In *Fenenbock,* the Court of Appeal held conspiracy to commit assault with a deadly weapon was not an included offense within conspiracy to commit murder. *Fenenbock* rejected application of the accusatory pleading test because overt acts do not form part of the conspiracy. (*Id.* at p. 1709 ["It is the agreement, not the overt act in furtherance of the agreement, which constitutes the offense"].)

Sidestepping the split in authority, the Attorney General suggests defendants invited any error by refusing *any* lesser included instructions on tactical grounds. (See *People v. Barton* (1995) 12 Cal.4th 186, 198 [error in failing to instruct is "still error" but "when the trial court accedes to the defendant's wishes, the defendant may not argue on appeal that in doing so the court committed prejudicial error, thus requiring a reversal of the conviction"].) Defendants respond the record does not show a tactical decision to refuse instructions but rather a misunderstanding as to the court's duty to give the instruction. They also contend trial counsel's decision not to argue the lesser included offenses did not absolve the court of its duty to give the instructions. (See *id.* at pp. 196-197.)

We need not decide these issues, as any error in failing to give lesser included instructions was indisputably harmless. "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) By finding defendants acted with premeditation and deliberation, the jury necessarily found they

harbored the requisite specific intent to kill. Because the evidence demonstrates the conspiracy was formed shortly before the attempted murder, it is inconceivable the jury would have concluded the defendants agreed to commit a crime less than murder, when the criminal act in furtherance of that same conspiracy was a deliberate and premeditated attempted murder. Similarly, the same finding resolved the issue of attempted assault with a deadly weapon, as opposed to attempted murder, against defendants. Any error in failing to instruct on lesser included offenses could only have been harmless.

F. CONSPIRACY

Defendants argue the verdicts rendered in this case are, at best, ambiguous regarding the conspiracy for which they were convicted. They suggest that under the verdict forms given to the jury, which identified defendants' conspiracy as merely one "to commit a crime," the jury may have intended to convict them of a lesser conspiracy to commit some offense other than murder. By interpreting the completed verdict forms to mean the conspiracy was one to commit murder, the trial court made a determination of fact, invading the province of the jury in violation of federal due process under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (See *id.* at p. 490 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"].) For the reasons we discuss below, this argument is without merit.

People v. Coelho (2001) 89 Cal.App.4th 861 (*Coelho*) is instructive on this point. Interpreting the effect of *Apprendi* on ambiguous verdicts, *Coelho* recognized "a defendant's federal constitutional right to a jury trial requires the trial court to accept the *jury's* determination concerning the factual bases for its verdicts. It follows that a court's failure to do so constitutes error of federal constitutional dimension, subject to review

under the strict federal standard." (*Id.* at p. 878.) Thus, faced with an ambiguous verdict, *Coelho* determined a reviewing court's task is "'not to determine whether the evidence and argument *could* support the government's interpretation of the jury's verdict, but whether it *inevitably must lead* to such a construction.'" (*Coelho*, *supra*, 89 Cal.App.4th. at p. 877, quoting *United States v. Melvin* (1st Cir. 1994) 27 F.3d 710, 714.) In other words, the reviewing court's task "'is confined to determining beyond any reasonable doubt whether the jury *did* find such a conspiracy and whether it intended the verdict it returned to reflect that determination. *Only in that manner may we avoid invading the special province of the jury in a criminal case both to find the facts and apply the law as it sees fit*.'" (*Coelho, supra,* 89 Cal.App.4th at p. 877, quoting *United States v. Dennis* (11th Cir. 1986) 786 F.2d 1029, 1041.) The standard for this determination is certainty beyond a reasonable doubt. (*Coelho, supra,* 89 Cal.App.4th at p. 876.)

The appellate court makes its determination on de novo review of the record. "Because, in general, the record produced at trial will be undisputed, . . . 'a reviewing court is as competent as a trial court to determine the factual basis the jury used for its verdicts.'" (*Coelho*, *supra*, 89 Cal.App.4th at p. 879.)

We conclude the verdict form utilized in this case was ambiguous but it is clear beyond a reasonable doubt the jury intended to convict defendants of a conspiracy to commit *murder*, not some lesser crime.

The verdict form returned by the jury for each defendant read: "We the jury in the above-entitled action find the Defendant . . . *GUILTY* of the crime of FELONY, to-wit: Violation of Section 182[a](1) of the PENAL Code of the State of California (CONSPIRACY TO COMMIT A CRIME) as charged in COUNT 1 of the Information." As the Attorney General points out, the amended information identified the conspiracy as conspiracy to commit murder. Count 1 stated both defendants "did

willfully and unlawfully conspire together and with another person and persons . . . to commit the crime of MURDER . . . ." But the record does not indicate the information was read to the jury or whether it was provided to them during their deliberations. On its face, the verdict form does not clearly identify the crime the defendants conspired to commit.

The jury instructions, on the other hand, clearly and repeatedly identified the conspiracy as one to commit murder.[1] The first sentence of the conspiracy instruction, CALJIC No. 8.69, stated: "Defendant is accused in Count One of having committed the crime of conspiracy to commit murder in violation of section 182[a](1) of the Penal Code." The instruction went on to identify the relevant conspiracy as a conspiracy to commit murder on three more occasions. First, it defined murder as "the unlawful killing of a human being with malice aforethought" and provided: "A conspiracy to commit murder is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of murder and with the further specific intent to commit that murder followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement." Next, the instruction stated: "The crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely the specific intent to kill unlawfully another human being." Finally, the trial court defined the elements of the murder conspiracy (CALJIC No. 8.69) as follows: "In order to prove this crime, each of the following elements must be proved: One, two or more persons entered into an agreement to kill unlawfully another human being; two, each of the persons specifically intended or entered into an agreement with one or more other persons for that purpose;

[1] The court provided each juror a copy of the instructions on which to take notes and permitted the jurors to take the instructions into deliberations.

three, each of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and, four, an overt act was committed in this state by one or more of the persons who agreed or intended to commit murder."

We note the heading for CALJIC No. 8.69, which was not recited to the jury but which was included in their written instructions, read in boldface type: "CONSPIRACY TO COMMIT MURDER." No other instruction or heading referenced any other conspiracy besides a conspiracy to commit *murder*.

Based on the language used in the verdict forms, defendants still contend the jury convicted them of a conspiracy to "commit a crime," as opposed to conspiracy to commit murder. Molina argues, "Such a crime does in fact exist and it is not set forth in the information as Count I." The argument is premised on defendants' interpretation of section 182, subdivision (a)(1), which reads: "If two or more persons conspire: [¶] To commit any crime. [¶] . . . [¶] They are punishable as follows: [¶] . . . ."

Specific punishments are listed for some of the conspiracies defined in section 182, subdivision (a)(2) through (6). Because no particular punishment is specified in reference to subdivision (a)(1), defendants argue the section's "catchall" provision applies: "When they conspire to do any other act described in this section, they shall be punished by imprisonment . . . in the state prison . . . ." Under section 18, when a statute calls for imprisonment in the state prison without stating a specific number of years, the offense "is punishable by imprisonment in any of the state prisons for 16 months, or two or three years . . . ." Thus, defendants maintain that, instead of the 25 years to life they received for conspiracy to commit murder, at most they should have been sentenced to three years for a purported conspiracy "to commit a crime." We are not persuaded.

The jury's verdict must be read in light of the instructions given. (*People v. Jones* (1997) 58 Cal.App.4th 693, 710.) The instructions did not reference any generalized "conspiracy to commit a crime," nor did they provide the elements of such an offense. Instead, the instructions were wholly devoted to conspiracy to commit murder. We must presume the jurors read as a whole the instructions given to them and did so in a rational fashion. (See *People v. Cruz* (2001) 93 Cal.App.4th 69, 73 ["[W]e presume that the jury 'meticulously followed the instructions given"']; see also (*People v. Martin* (1983) 150 Cal.App.3d 148, ["We assume jurors are intelligent persons capable of understanding and correlating jury instructions"].) Reading the instructions as a whole, we conclude the jury intended to convict defendants of conspiracy to commit murder, and not some other, lesser, crime.

Neither the evidence nor the argument of counsel below suggested the offense was anything less than conspiracy to commit murder. Defendants acknowledge no other conspiracy theory was presented to the jury. Defendants argue the jury could have found the defendants conspired to commit assault with a deadly weapon based on the location of the victim's wounds. They also emphasize a lesser included instruction on voluntary manslaughter was not limited to the attempted murder count, and therefore the jury could have concluded defendants conspired to commit a manslaughter. These scenarios are highly dubious. Given that the jury received no instruction on the elements of assault with a deadly weapon and heard no argument defendants conspired to commit a crime other than murder, we would have to assume the jury conjured up these theories on their own, in spite of the compelling evidence defendants conspired to commit murder.

More importantly, the jury's finding the attempted murder was deliberate and premeditated derails any notion the jury found defendants guilty of conspiracy to commit some offense other than murder. *People v. Morris* (1988) 46 Cal.3d 1 is

analogous. There the murder prosecution was based on alternative theories of felony murder and premeditated homicide. The Supreme Court acknowledged the felony murder rule theory was untenable under the facts of the case, but concluded the jury rested its verdict on the legally correct theory of premeditated murder because of the special circumstance finding the murder was "willful, deliberate, and premeditated." (*Id.* at p. 24, disapproved on another ground in *People v. Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

Similarly, we conclude the jury convicted defendants of conspiracy to commit murder rather than some other conspiracy, given their finding the defendants' attempted murder of the victim was deliberate and premeditated. As noted above, we find it inconceivable the jury would have concluded the defendants agreed to commit a crime less than murder when the jury also found the defendants' criminal act in furtherance of that same conspiracy was a deliberate and premeditated attempted murder. It is well-settled that the "form of the verdict generally is immaterial, so long as the intention of the jury to convict clearly may be seen." (*People v. Paul* (1998) 18 Cal.4th 698, 704.)

Given the jury's finding the attempted murder was premeditated, the lack of any instructions or argument as to a conspiracy less than murder, and the extensive instructions on conspiracy to commit murder, we conclude beyond a reasonable doubt the jury found the defendants conspired to commit murder.

III

DISPOSITION

The judgment of the trial court is affirmed.

_____
ARONSON, J.

WE CONCUR:

_____
BEDSWORTH, ACTING P. J.

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O'LEARY, J.